



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2004

Ms. J. Middlebrooks
Assistant City Attorney
Dallas Police Department
1400 South Lamar Street
Dallas, Texas 75215-1801

OR2004-0015

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193536.

The Dallas Police Department (the "department") received a request for information relating to a particular Dallas police officer, including his complete personnel file; daily observation reports of the officer by field training officers; and any documentation of the officer's time, achievements, and progress in the police academy. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

You concede that the department did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301 also requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

You inform us that the department received the present request for information on September 24, 2003. In requesting this decision on October 22, 2003, you did not comply with the ten-business-day deadline prescribed by section 552.301(b). Likewise, the department did not comply with the fifteen-business-day deadline under section 552.301(e). Therefore, the submitted information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. In this instance, the department claims exceptions to disclosure under sections 552.101, 552.117, 552.119, and 552.130 of the Government Code. As these exceptions can provide compelling reasons for non-disclosure under section 552.302, we will consider your arguments.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is made confidential under federal and state law. Federal law governs the dissemination of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); *see also Open Records Decision No. 565 at 10-12 (1990)*. The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See Gov't Code* § 411.089(b). Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Likewise, CHRI held by the Texas Department of Public Safety or another criminal justice agency must be withheld from

the public as provided by subchapter F of chapter 411 of the Government Code. Therefore, any responsive CHRI obtained from the NCIC or TCIC networks must be withheld from disclosure under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Section 552.101 of the Government Code also incorporates section 1703.306 of the Occupations Code. Chapter 1703 of the Occupations Code codifies the Polygraph Examiners Act. *See* Occ. Code § 1703.001. Section 1703.306 provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Id. § 1703.306. We have marked polygraph information that is confidential under section 1701.306. As there is no indication that this requestor has a right of access to this information, it must be withheld under section 552.101 of the Government Code.

Information created or maintained by a mental health professional is made confidential under section 611.002 of the Health and Safety Code. This section provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See Open Records Decision No. 565 (1990)*. We have marked the submitted information that is confidential under section 611.002 of the Health and Safety Code. There is no indication that the requestor has a right of access to this information under sections 611.004 and 611.0045. Therefore, the department also must withhold the information that is encompassed by section 611.002 under section 552.101 of the Government Code.

A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 at 2-4 (1994)*. It is not apparent to this office that the social security number that we have marked is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in question was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See Gov't Code §§ 552.007, .352*. Therefore, before releasing the marked social security number, the department should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

You also raise section 552.101 of the Government Code in conjunction with common-law privacy. The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a law enforcement agency compiles criminal history information with respect to a particular individual, the compiled information takes on a character that implicates that individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also Open Records Decision No. 616 at 2-3 (1993)*.

The common-law right to privacy also encompasses the types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since determined that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

Certain types of personal financial information also are protected by common-law privacy. This office also has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision Nos. 600 at 9-12 (1992) (TexFlex benefits), 545 at 3-5 (1990) (deferred compensation plan), 523 at 3-4 (1989) (certain financial information contained in loan files of veterans participating in Veterans Land Board programs), 373 at 3-4 (1983) (certain financial information contained in housing rehabilitation grant application files).

You contend that portions of the submitted information are protected by common-law privacy. We have marked the types of private information that the department must withhold under section 552.101.

Next, we address the information that you seek to withhold under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home address and telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer complies with sections 552.024 or 552.1175. We have marked the types of information that the department must withhold under section 552.117(a)(2). We note that section 552.117 is not applicable to information that relates to a peace officer as a criminal suspect or arrested person.

You also raise section 552.117 with regard to individuals who do not appear to be employed by the department as peace officers or as civilian employees. We note that you have no obligations under section 552.117 with regard to information that pertains to a peace officer employed by a law enforcement agency other than the department or an official or employee of a governmental body other than the City of Dallas. See Open Records Decision No. 674 at 4 (2001) (governmental body is normally obliged under section 552.117 to protect only information pertaining to employees and officials of that governmental body). In the event, however, that the individuals in question are current or former officials or employees of the City of Dallas, their home addresses and telephone numbers, social security numbers, and family member information are excepted from public disclosure under section 552.117(a)(1) if they elected to keep that information confidential under section 552.024 of the Government Code. Whether section 552.117(a)(1) protects a particular item of information must be determined at the time of the governmental body's receipt of the request for

information. *See* Open Records Decision No. 530 at 5 (1989). Thus, a governmental body may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee of the governmental body who made a request for confidentiality under section 552.024 prior to the receipt of the request for that information. Information may not be withheld under section 552.117(a)(1) on behalf of an individual who did not make a timely election to keep the information confidential.

In the event that any of the individuals in question is or was a peace officer of another law enforcement agency, the department may be required to withhold information relating to such an individual under section 552.1175 of the Government Code. Section 552.1175 also applies to information that relates to peace officers, as defined by article 2.12 of the Code of Criminal Procedure, and provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). Thus, if an individual not affiliated with the department or the City of Dallas is a peace officer who has elected to restrict access to his or her information in accordance with section 552.1175, or is no longer a peace officer but previously made such an election while he or she was still a peace officer, then the department must withhold that individual's home address and telephone number, social security number, and family member information under section 552.1175.

Lastly, we address your claim under section 552.130 of the Government Code. This section excepts from disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a)(1)-(2). Section 552.130(a)(1) is applicable to information that relates to a Texas driver's license. Section 552.130(a)(2) is applicable to information that relates to a Texas motor vehicle title, vehicle registration, or vehicle identification number. We have marked the types of information that you must withhold under section 552.130.

In summary: (1) CHRI obtained from the NCIC or TCIC networks must be withheld under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (2) you must withhold the information that is confidential under section 552.101 in conjunction with section 1703.306 of the Occupations Code and section 611.002 of the Health and Safety Code; (3) a social security number may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (4) you must withhold the information that is excepted from disclosure under sections 552.117(a)(2) and 552.130 of the Government Code; and (5) you may be required to withhold other information under sections 552.117(a)(1) or 552.1175. The rest of the submitted information must be released. As we are able to make these determinations, we need not address your claim under section 552.119.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

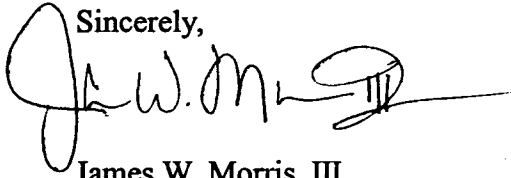
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 193536

Enc: Submitted documents

c: Ms. Holly Becka
The Dallas Morning News
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(w/o enclosures)